Supreme Court, U.S.
FILED
JAN 2 1997
CLERK

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No. 96-855

In The

Supreme Court of the United States

October Term, 1996

DONALD VAN ORT; HELEN VAN ORT,

Petitioners,

v.

ESTATE OF MICHAEL STANEWICH, deceased; ANNA L. PREVOST, as Special Administratrix of THE ESTATE OF MICHAEL STANEWICH; COUNTY OF SAN DIEGO; AND SAN DIEGO SHERIFF'S DEPARTMENT; AND DOES 1-20, INCLUSIVE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN J. SANSONE, County Counsel
County of San Diego
DIANE BARDSLEY, Chief Deputy
RICKY R. SANCHEZ, Deputy
1600 Pacific Highway, Room 355
San Diego, California 92101-2469
(619) 531-4749

Counsel for Respondent
County of San Diego

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

17 pp

QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals correctly decided that the off-duty criminal conduct of a person employed as a deputy sheriff does not give rise to municipal liability under 42 U.S.C. section 1983.

LIST OF PARTIES

Respondent is the County of San Diego, a public entity and a political subdivision of the State of California.

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TO THE HONORABLE SUPREME COURT:

Defendant/respondent County of San Diego, a political subdivision of the State of California, submits this brief in opposition to the petition for a writ of certiorari submitted by plaintiffs/petitioners Donald Van Ort and Helen Van Ort.[1]

INTRODUCTION

Petitioners, Donald Van Ort and Helen Van Ort, have petitioned for review of the published decision of the Ninth Circuit Court of Appeals affirming the district court's judgment in favor of respondent. Respondent County of San Diego respectfully requests that the Van Orts' petition be denied. Petitioners fail to establish that the Court of Appeals' decision is in conflict with the decisions of other circuits or with precedent of this court or that this case presents an important question of federal law which requires review by this Court.

STATEMENT OF THE CASE

On July 3, 1991, Michael Stanewich ("Stanewich"), an off-duty San Diego County Sheriff's deputy, wearing civilian clothes, a mask and latex gloves, and brandishing a gun, forcibly entered the residence of Donald Van Ort and his grandmother, Helen Van Ort, to rob them. While

[1] The respondent does not contest the petitioners' statement of jurisdiction.

committing armed robbery, Stanewich was shot and fatally wounded by a uniformed deputy sheriff who went to the residence in response to an emergency call of a crime in progress.

About a month earlier, on May 30, 1991, Stanewich and other Sheriff's deputies searched the Van Orts' residence for narcotics pursuant to a Fourth Amendment waiver provision in Donald's parole order. During that search, Donald Van Ort opened a safe containing cash.

Stanewich was hired as a deputy sheriff on January 9, 1981, following a pre-employment background investigation. On September 21, 1990, he received a detective assignment. His duties included investigating narcotics violations.

During his 10-year service as a deputy sheriff, Stanewich had three department-generated complaints and nine citizen-generated complaints lodged against him. Only three of the citizen complaints were sustained. (Trial Exhibit 5 in Van Orts' Excerpts of the Record "V.O.E.R." Vol. II, Tab "T" 24-5 §§ 1 through 12; Supplemental Excerpts of the Record "S.E.R." 2 and 3 augment T24-5 §§ 6 and 8.) The last citizen complaint against him was lodged in 1988.

Prior to trial, the district court granted partial summary judgment, ruling that the County was not vicariously liable for Stanewich's robbery attempt because he was neither in the course and scope of employment nor acting under color of law.

After the close of all evidence, but before the case was submitted to the jury, the district court granted the

County judgment as a matter of law on the Van Orts' state law tort claim for negligent hiring. The Court of Appeals affirmed, and petitioners do not seek review of that decision.

The district court allowed the Van Orts' federal municipal civil rights claim against the County, brought under 42 U.S.C. section 1983 ("section 1983"), to go to the jury, which returned their verdict against the County.[2] In a special verdict, the jury found that the County had official policies that were inadequate in that they failed to consider and review disciplinary actions at the time of transfer, assignment, or promotion of officers; and failed to include a specific system for warning supervisors about officers with patterns of misconduct.

Following the jury's verdict, the County moved to set aside the verdict on the Van Orts' section 1983 claim. The district court granted the County's motion and the Van Orts appealed. The Court of Appeals affirmed, holding that there was no basis for imposing section 1983 liability because Stanewich's off-duty conduct was not state action under color of law; there was no affirmative government act that created any duty to protect the Van Orts from harm; and Stanewich's private actions as a freelance criminal were not reasonably foreseeable. *Van Ort v. Estate of Michael Stanewich*, 92 F.3d 831, 836-837 (9th Cir. 1996).

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[2] The jury also found the Estate of Michael Stanewich liable on various tort theories.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT BETWEEN THE CIRCUITS OR WITH PRECEDENT OF THIS COURT

Petitioners urge that their petition for writ of certiorari should be granted because there is a conflict between the circuits and within the Ninth Circuit Court of Appeals regarding what constitutes state action under color of law. Petitioners are mistaken.

Consistent with this Court's precedent, the Court of Appeals determined that Stanewich's conduct on July 3, 1991, was not "under color of state law" because he was not acting "in his official capacity or while exercising his responsibilities [as a deputy sheriff] pursuant to state law." *West v. Atkins*, 487 U.S. 42, 50 [101 L.Ed.2d 40] (1988).

Contrary to Petitioners' assertions, *Vang v. Xiong X. Toyed*, 944 F.2d 476 (9th Cir. 1991), is not inconsistent with the Court of Appeals decision herein. Defendant Xiong was deemed to have acted under color of law because he used his employment status to get his clients to accompany him on car trips, during which he raped them. In the present matter, Stanewich forcibly entered the petitioners' residence to commit the robbery without the use of any indicia of police authority. His robbery attempt was in no way connected to his duties or responsibilities as a duty sheriff. Rather, Stanewich was engaged in a personal pursuit. (C.R. 111.) The only fact distinguishing this robbery from any ordinary armed robbery was that the robber was an off-duty deputy sheriff. This distinction is without consequence because acts of police officers in the ambit of their personal pursuits are excluded from

the term "color of law." *Screws v. United States*, 325 U.S. 91 [89 L.Ed.2d 1495] (1945).

The Court of Appeals decision which affirmed the district court's finding that Stanewich was a private actor when he attempted to rob petitioners is consistent with all applicable precedent. In so deciding, the Court of Appeals specifically recognized the principle enunciated by this Court in *DeShaney v. Winnebago Soc. Serv.*, 489 U.S. 189, 195 [103 L.Ed.2d 249] (1989), that constitutional liability does not generally extend to deprivations of life, liberty, or property caused by private actors. Referring to precedent from within and outside the Ninth Circuit, the Court of Appeals found that absent the existence of a special relationship between the individual and the government from which a duty to protect arises, or affirmative conduct by the government that places the individual in immediate peril, "members of the public have no constitutional right to sue state employees who fail to protect them against harm inflicted by third parties." *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992); see also *Reed v. Gardner*, 986 F.2d 1122, 1127 (7th Cir. 1993). Neither of these two special circumstances existed in this case.[3] Thus, the Court of Appeals, consistent with precedent, correctly decided that Stanewich's actions on July 3, 1993, were not under color of law. Petitioners cite no decision of a circuit court which is in conflict with the opinion of the Court of Appeals in this matter.

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[3] Petitioners suggest that because knowledge was imparted to Stanewich through his job, his later off-duty criminal conduct becomes conduct under color of law. No case has ever approved such a theory.

Petitioners next assert that this court should grant review because there is a conflict among the circuits regarding what must be proved to establish causation in a section 1983 case. Petitioners are incorrect. It is well settled that a municipality may not be held liable under section 1983 solely because it employs an individual later found to have deprived a citizen of constitutional rights. *Monell v. Dept. of Social Services of New York*, 436 U.S. 691 [56 L.Ed.2d 611] (1978). Only when a municipality's execution of an official policy or custom inflicts a constitutional injury may the government entity be liable under section 1983. *Id.*

The standard for causation in *Monell* liability cases, as expressed by this Court, is that the alleged deficient official policy or custom be "the moving force" behind the constitutional injury. *Canton v. Harris*, 489 U.S. 378, 389 [103 L.Ed.2d 412] (1989); *Oviatt By and Through Waugh v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992). The municipal policy maker must have known or could be said to have reasonably known that the policy would set into motion a series of acts that would cause others to inflict the constitutional injury. *Bateson v. Geisse*, 857 F.2d 1300, 1304 (9th Cir. 1988). The evidence must establish an affirmative link between the harm and the adoption of a plan or policy. The link must show the policy maker's authorization or approval of the resulting misconduct, *Rizzo v. Goode*, 423 U.S. 362, 371 [46 L.Ed.2d 561] (1976), thereby establishing that the policy was "closely related to the ultimate injury." *Canton v. Harris*, 489 U.S. at 391.

In this case, the Court of Appeals used the standard test of proximate cause in its analysis, which is consistent with this Court's precedent and the decisions of other

circuits. An official policy or custom is the proximate cause if the resultant constitutional injury is foreseeable. *Van Ort v. Estate of Stanewich*, 92 F.3d at 840. *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994), which petitioners cite in urging review, held, consistent with the Court of Appeals decision in this case, that proximate cause is the standard for section 1983 liability. Petitioners cite no cases contrary to this accepted standard.

Petitioners sought to establish an official custom which caused their injuries, relying solely on the alleged disregard of Stanewich's disciplinary history. The purported custom was the County's alleged failure to consider and review disciplinary histories at the time of transfer, assignment, or promotion of officers; and failure to include a specific system for warning supervisors about officers with patterns of misconduct. The gist of petitioners' argument is that but for Stanewich's assignment to narcotics investigations, and the knowledge he gained about the petitioners from that assignment, he would never have met petitioners and attempted to rob them.

Although the Court of Appeals did not specifically decide whether any custom existed,[4] it did expressly

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[4] Because the trial evidence was confined to Stanewich's disciplinary history, it was insufficient as a matter of law to support a *Monell* claim based on a widespread official custom. *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367-68 (9th Cir. 1994); *Cf. Montiel v. City of Los Angeles*, 2 F.3d 335, 342-343 (9th Cir. 1993) [mishandling of the plaintiff's own citizen complaint would not establish that the city had a "policy or practice . . . of deliberate indifference to police brutality."]; *Davis v. City of Ellensburg*, 869 F.2d 1230, 1235 (9th Cir. 1989)

reject petitioners' "but for" causation argument, which type of argument has been consistently recognized as insufficient for causation in a section 1983 case. *Van Ort v. Estate of Stanewich,* 92 F.3d at 840. Chief Justice Rehnquist, in *Oklahoma City v. Tuttle,* 471 U.S. 808 [85 L.Ed.2d 791] (1985), explained the fallacy of the Van Orts' contention:

> "Obviously, if one retreats far enough from a constitutional violation some municipal 'policy' can be identified behind almost any such harm inflicted by a municipal official; for example, Rotramel [the police officer] would never have killed Tuttle if Oklahoma City did not have a 'policy' of establishing a police force." (*Id.* at 823.)

In *Canton v. Harris,* 489 U.S. 378, this court reiterated that it is insufficient merely to suggest in hindsight that, if some different policy existed, the unfortunate event might have been prevented:

> "In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident. (Citation omitted.) Thus, permitting cases against cities for their 'failure to train' employees to go forward under § 1983 on a lesser standard of fault would result in de facto respondeat superior liability on municipalities – a result we rejected in *Monell* (citation omitted)." (*Id.* at 392.)

(same standard applies to training and supervision); *Canton v. Harris,* 489 U.S. at 391.

None of the cases petitioners cite are contrary to the standard of causation correctly utilized by the Court of Appeals in this matter. There is no compelling reason for this court to review the Court of Appeals' decision.

II. THIS CASE PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW AND WAS FULLY CONSIDERED AND CORRECTLY DECIDED BELOW

Petitioners assert that this case presents an important question of federal law by summarily concluding that the issues presented frequently arise and because persons injured by the off-duty conduct of government officials should receive compensation. Although the facts in this case are interesting, the case does not present a novel legal issue. Petitioners' contentions do not satisfy the requirement of Supreme Court Rule 10, that petitioners identify a compelling reason to justify granting of their petition for writ of certiorari.

The courts below correctly decided that the trial evidence did not satisfy the foreseeability requirement for causation, as a matter of law. The casual connection between the knowledge Stanewich obtained from his assignment to narcotics investigations and his robbery of the Van Orts is too attenuated and remote for any civil rights liability to arise therefrom. See e.g., *Martinez v. California*, 444 U.S. 277, 285 [62 L.Ed.2d 481] (1980); *DeShaney v. Winnebago Soc. Serv.*, 489 U.S. at 197 n.4.

Stanewich's disciplinary record did not make foreseeable the violent and malicious acts he would commit against petitioners. During Stanewich's ten-year career, only three citizen-generated complaints against him were

sustained. None were materially similar to Stanewich's attempted armed robbery. (V.O.E.R., Vol. II, T24-5 §§ 11, 7, 9, 6; S.E.R. 2.) Contrary to petitioners' representation in their petition, Stanewich engaged in only one surveillance for which he was disciplined. Discipline was imposed because he conducted it without a partner, and had not received pre-approved overtime for the work. *Id.* The Court of Appeals correctly concluded that such procedural transgressions were insufficient to make a subsequent off-duty crime foreseeable.

No other San Diego County sheriff's deputy in history has ever committed such a crime on or off duty. (R.T. 8/10/94, 91:7-10.) This fact alone undercuts any kind of foreseeability theory, or argument that there was an obvious need for changed practices. See e.g., *Canton v. Harris*, 489 U.S. at 390.[5]

The expert testimony also provided no support for a finding that Stanewich's robbery attempt was foreseeable. Petitioners' police expert merely speculated: "Something was going to happen. I couldn't say that was going to happen but something negative was going to happen." (R.T. 8/10/94, 103:8-10.) Another stated:

> "I don't believe that they could have necessarily predicted that he was going to commit a robbery, but I think there was a long series of

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[5] For County policy makers to have been deliberately indifferent to the need for the Van Orts' prophylactic measures, one must be able to conclude from the evidence that they knew to a moral certainty that County deputy sheriffs will exploit on-the-job information for criminal purposes. (See e.g., *Canton v. Harris*, 489 U.S. at 390 fn. 10.)

> problems that could allow them to successfully predict that there was going to be some kind of escalating problems in the future, whether it be a robbery or something lesser or perhaps even greater." (R.T. Vol. IV, 8/12/94, 574:25-575:6.)

Two other experts testified that there was nothing in Stanewich's record to indicate that his supervisors should have known that he would commit a robbery. (R.T. Vol. XII, 2140:25-2141:3; Vol. XVI, 2363:14-2364:3.) Stanewich's off-duty criminal conduct was simply not foreseeable.

This case does not present an important question of federal law which requires review by this Court.

CONCLUSION

In asking this Court to grant their petition for writ of certiorari, petitioners do little more than repeat their version of the facts. Their petition does not state a basis upon which this Court should grant certiorari. Respondent County of San Diego respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

JOHN J. SANSONE, County Counsel
County of San Diego
DIANE BARDSLEY, Chief Deputy
RICKY R. SANCHEZ, Deputy
1600 Pacific Highway, Room 355
San Diego, California 92101-2469
(619) 531-4874

Counsel for Respondent
County of San Diego